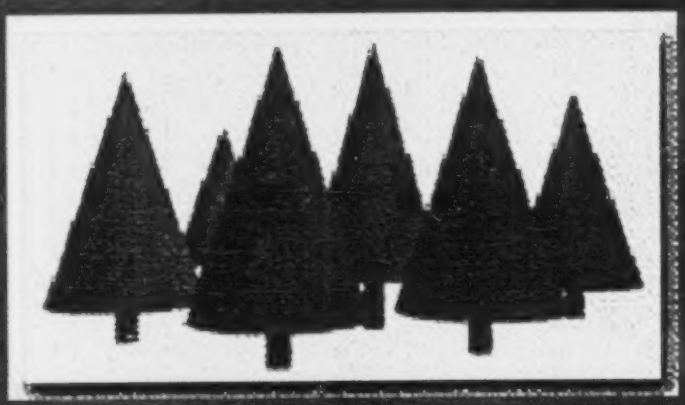
Managing Risk Within a Statutory Framework

The Forest Practices Code



Compliance &
Enforcement Branch

March 1999

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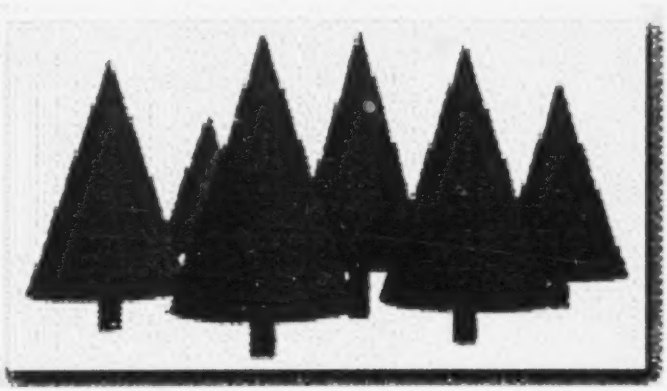

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MANAGING RISK
WITHIN A STATUTORY FRAMEWORK

The Forest Practices Code

Table of Contents

Introduction 1

Part I Managing Risk – The Basic Principles 3

Part II The Statutory Framework – The Evolution of Forest Management in British Columbia 9

- The Legislature Takes Control Of Forest Management 10
- The Approach to Risk Management 11

Part III The Respective Roles of Government Officials and Licensees 15

- Role Of Forest Service And Other Government Officials 15
- Role of Licensees And Their Foresters 17
- Professional Accountability 20

Part IV The Four Risk Management Stages under the Forest Practices Code 23

- Stage 1 – Developing the Legislative Framework 23
- Stage 2 – Operational Planning 25
- Stage 3 – Compliance 31
- Stage 4 – Enforcement 35

Part V The "Legal Tool-kit" – The Principles of Statutory Interpretation and Administrative Law 39

- Principles of Statutory Interpretation 39
- Principles of Administrative Law 42

Summary 49

Q's and A's 51

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MANAGING RISK
WITHIN A STATUTORY FRAMEWORK

The Forest Practices Code

Introduction

In June 1995, the regime that governed practices within the province's forests for over eighty-five years[1] was replaced by a statutory regime: the *Forest Practices Code of British Columbia Act* and its associated regulations (the Forest Practices Code). The significance of this change for **everyone** involved in the management and development of the province's forests cannot be over estimated. However, it has for the most part fallen to the Forest Service officials charged with administering the Forest Practices Code and the forest tenure holders (licensees) who have been granted rights to harvest timber within these forests to meet the challenges associated with this transition. These challenges spring in part from:

- the change in the legal framework governing forest practices, particularly the greater reliance on **statutory interpretation** and **administrative law principles** as the primary vehicles for establishing the **rights** and **obligations** of licensees; and
- the **risk management principles** underlying the Forest Practices Code, particularly the way in which these principles are reflected in **operational planning**, **compliance** and **enforcement** activities.

These challenges also reflect the greater **freedom of choice** – along with the greater **responsibility** – which the Forest Practices Code has conferred on licensees, and the increased reliance the Forest Practices Code has placed on their foresters. This aspect of the new statutory regime has significantly altered the **relationship** between licensees, their foresters, and the Forest Service and other government officials charged with administering the Forest Practices Code.

If the forest industry and the government are to work together to effectively apply the risk management principles underlying the Code, they must understand the differing but complementary roles of licensees and their foresters on the one hand and Forest Service and other government officials on the other.

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[1] The nature of this regime is discussed in Part II (pp. 9-10)

This Booklet

To help Forest Service officials understand their role under the Forest Practices Code, the Compliance and Enforcement Branch of the Ministry of Forests has developed the *Risk Management and the Principles of Statutory Decision Making Handbook* (October 1998)[2].

The purpose of this booklet, **Managing Risk Within a Statutory Framework**, is to review the same issues from the perspective of licensees and their foresters.

Part I Provides an overview of the basic principles of risk assessment and risk management, and briefly discusses their application in the forest management context.

Part II Discusses the statutory framework and provides an overview of the evolution of forest management in British Columbia, culminating in the enactment of the Forest Practices Code.

Part III Describes the roles of:

1. Forest Service and other government officials, and
2. licensees and their foresters.

Part IV Discusses the four stages of risk management under the Forest Practices Code:

1. developing the legislative framework;
2. operational planning;
3. compliance; and
4. enforcement.

Part V Provides an overview of the "legal tool-kit" which licensees and their foresters can use to operate more effectively within a statutory framework: (1) the principles of statutory interpretation; and (2) the principles of administrative law.

In addition, at the end of the booklet there is a section entitled "Q's and A's" that tries to address some of the commonly asked questions about managing risk within a statutory framework.

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[2] For more information about the *Risk Management and the Principles of Statutory Decision Making Handbook* (October 1998), contact the Manager of Training and Communications, Compliance and Enforcement Branch, Ministry of Forests, 4th Floor, 2955 Jutland Road, PO Box 9595 Stn Prov Govt, Victoria, B.C. V8W 9C1. To learn more about risk management, you can also visit the **Compliance and Enforcement Branch Risk Management Website** at http://www.for.gov.bc.ca/enforce/index.htm.

Part I Managing Risk – The Basic Principles

Introduction

Risk is the **potential** for loss or damage resulting from an action or decision. One of the most challenging aspects of forest management in general, and the Forest Practices Code in particular, is the approach to risk. The underlying goal is not to avoid or eliminate it, but rather to **assess** and **manage** it. In doing this we must recognize not only the potential loss or damage, but also the potential benefits.

Risk assessment is the process of determining the **likelihood** of loss or damage occurring and the **magnitude** of the consequences should the loss or damage occur.

Risk management is the "art" of weighing the assessed risks against the expected benefits to make the "best" forest management decision. The objective is to:

- achieve optimal or at the very least acceptable levels of risk, where the benefits flowing from a particular action or decision outweigh the potential loss or damage[3]; and
- avoid unacceptable levels of risks, where the likelihood and magnitude of the potential loss or damage outweigh the expected benefits, or where the magnitude of the potential loss or damage, regardless of its likelihood, is such that it cannot be reversed or mitigated.

Risk Management Values

In order to assess risk one must begin by identifying the **values** that may be impacted by an action or decision. In the forest management context, these values fall into three main categories: **environmental**, **social** and **economic**.

Environmental values are the physical and ecological aspects of the province's forests, such as sensitive or unstable terrain, fish habitat, water quality, wildlife habitat and the

[3] An **optimal** level of risk is where the net benefits are **maximized**. While this is generally the goal, it is one that is almost impossible to realize. However, one must at least achieve an **acceptable** level of risk, where the net potential benefits **outweigh** any potential loss or damage.

timber resources. Licensees, their foresters, and Forest Service officials alike have long recognized that these values can be negatively affected by forest practices causing inordinate soil disturbance, landslides, unauthorized harvesting, windthrow, siltation, etc. Indeed, much of the training received by foresters is focused on the management of environmental values, and such values tend therefore to be among the best understood and most closely managed values associated with the province's forests. In part, this is because many environmental values are in fact closely linked to important economic values. For example, the importance of ensuring the sustainability of the province's timber resources has long been an economic, as well as an environmental, priority[4]. Other environmental values may have no discernible link to economic values, but are still recognized by foresters as having their own inherent value in contributing to the biological diversity of our province[5].

Social values are the cultural, spiritual and aesthetic values which the province's forests hold for some or all of the people of the province. The courts have recently highlighted the importance of these social values for the province's aboriginal peoples (affording them constitutional protection). The fact that our society is increasingly prepared to sacrifice at least some economic values in order to protect purely environmental values such as biological diversity, or aesthetic values such as visual quality, reflects in part the growing importance of these social values for the province's non-aboriginal peoples as well. The "pioneer" mentality, with its underlying focus on economic exploitation, no longer drives our forest management decisions. The province's forests may be its "economic engine", but they are also much more to the people of the province.

Even the management of **economic values** has become more complex as economic interests begin to diverge. Increasingly, the challenge is not simply to balance environmental and social values against economic values, but also to balance competing economic values. As markets and technology change, the interests of forest companies, forest workers, resource based communities, and the public at large are no longer as compatible as they once were[6]. Indeed, even the economic interests of the forest companies themselves do not necessarily coincide, and the decisions of one company

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[4] The province has actively promoted reforestation programs since the first half of the 20th century, and in 1987 mandatory soil conservation and reforestation provisions were introduced into the Forest Act. Other environmental values also have a recognized link to economic values, e.g. fish habitat is linked to the viability of both commercial and recreational fishing industries.

[5] It is also important to keep in mind that, as with environmental values, some social values may also be linked to economic values. For example, the aesthetic values associated with visual quality are often linked to the viability of a growing tourist industry.

[6] For example, the forest companies' goal is profit (reflecting their primary obligation to their shareholders); the forest workers' goal is employment; the resource based communities' goal is stability; and the goal of the public at large is revenue to support hospitals, schools, transportation infrastructures, and other government services. In the past, these goals tended to coincide. The best way for the forest companies to make a profit was to utilize the labour of large numbers of forest workers in processing facilities located in small communities near the timber resources. Their activities were able to generate a steady revenue stream sufficient to support the government services required by the public at large. Now, however, these companies are laying off forest workers and shutting down timber processing facilities. For a variety of reasons, their profitability is in doubt and their activities no longer generate sufficient revenue to support the government services required by the public at large.

all too often have an adverse impact on the interests of another company[7]. Consequently, assessing and managing risks to economic values has become one of the more challenging aspects of forest management.

All three categories of risk – environmental, social and economic – require consideration in order to make sound forest management decisions based on equally sound risk management decisions. To this end, one must assess the risk to each of these categories of values. Although there is often some overlap, each category has its own unique variables, uncertainties and risk factors and consequently must be individually assessed.

Risk Assessment Steps

The risk assessment process can be divided into **six steps**. These steps provide the basis for assessing risk in both the **operational planning** and **compliance** context[8].

	Risk Assessment Steps
Identify potential detrimental events ⇩	Identify potential detrimental events and the potential environmental, social and economic values that may be impacted.
Determine likelihood ⇩	Determine the likelihood (low, moderate, high) that the detrimental events will occur.
Determine magnitude of consequence ⇩	Determine the magnitude (low, moderate, high) of the consequence to each value (environmental, social, economic) if the detrimental event occurs.
Initial risk rating ⇩	Determine the initial risk rating.
Risk factor adjustment ⇩	Adjust the initial risk rating based on risk factors such as performance (operational capacity, success/failure rate, etc.), market considerations, and timing (season).
Final risk rating	Determine the final environmental, social and economic risk rating.

[7] For example, under the province's "comparative value pricing" stumpage system, the operating decisions one company makes can adversely impact the stumpage paid by another company, and can ultimately increase the costs incurred by all companies. The "waterbed" effect and the "cost creep" phenomenon are discussed below in Part IV under operational planning (p. 28).

[8] See discussion in Part IV under operational planning and compliance (pp. 25-34).

Determining Risk Rating

The following formula and table represent a guide for determining risk ratings for each environmental, social and economic value that may be impacted by an action or decision.

Risk = Likelihood x Magnitude of Consequence

By multiplying the likelihood of each detrimental event by the magnitude of the consequence to each value, and then identifying the highest risk to the value, the risk rating is determined.

LIKELIHOOD	X	MAGNITUDE	=	Risk
High	x	High	=	Very High
High	x	Moderate	=	High
Moderate	x	High	=	High
High	X	Low	=	Moderate
Moderate	x	Moderate	=	Moderate
Low	x	High	=	Moderate
Moderate	x	Low	=	Low
Low	x	Moderate	=	Low
Low	x	Low	=	Low

It is important to stress that risk ratings are "determined" and not "calculated". They rely as much on **judgment** as they do on **empirical** data.

In particular, when determining likelihood or magnitude of consequence, it is important to recognize the **uncertainties** that affect the risk assessment process. Where uncertainty exists, one must make **reasonable assumptions**. However, if different assumptions result in different outcomes, one may have to determine the **range of possible outcomes**.

Uncertainty can never be eliminated entirely; it can only be managed. One approach is to attempt to reduce uncertainty by collecting more **information**, or carrying out further **analysis** or **research**. However, it is important to acknowledge the costs associated with this approach and to recognize that it may not be effective in the short term.

While investment in research and the collection and analysis of more information is essential to manage uncertainty in the long-term, it may be unrealistic to delay decisions in the short term while more information is collected or further analysis or research is carried out. When a decision cannot be delayed, other methods for managing uncertainties must be employed. For example, every five years (or sooner if circumstances warrant), the chief forester must determine an allowable annual cut for every timber supply area and tree farm licence area in the province. He is not permitted the luxury of delaying these determinations pending the collection of more information or the completion of further analysis or research. Accordingly, instead of trying to

eliminate or reduce all uncertainties, he manages them by using **sensitivity analyses** [9] and **judgment**.

The use of **sensitivity analyses** and **judgment** can be equally appropriate in the **operational planning** context[10].

Real Risk & Perceived Risk

In assessing risk to environmental, social and economic values, it is also important to understand the difference between "**real risk**" and "**perceived risk**".

"**Real risk**" is the term generally used to describe risk determined through a risk assessment process based on expert analysis and grounded in scientific principles. Because of the uncertainties generally associated with even the most expert analysis, "real risk" is not necessarily "real". It has, however, been subjected to sufficiently rigorous analysis to justify its use in making a decision. An example of "real risk" analysis in the forest management context is the terrain stability field assessment used to determine the likelihood of a landslide occurring. The assessment does not determine an exact probability, but does identify whether there is a low, moderate, high or very high likelihood of a landslide occurring. When this analysis of likelihood is combined with an analysis of the magnitude of the potential consequence if a landslide does occur, one is able to determine the "real risk" of a landslide for the area in question.

"**Perceived risk**", on the other hand, is based on an individual's or society's impressions, instincts, experience or intuition rather than empirical analysis. This does not mean that "perceived risk" does not or should not influence forest management decisions[11], or shape public policy[12]. However, it does make it more difficult to manage. There is a tendency to dismiss "perceived risk" because it is not based on expert analysis or scientific principles. However, "perceived risk" sometimes reflects knowledge borne of experience, and as such warrants consideration[13]. In other cases, "perceived risk" reflects an intuitive recognition of the uncertainties inherent in any "scientific" or "expert" analysis, and should be managed like other uncertainties. However, there are also cases where "perceived risk" reflects an individual's or society's unexamined beliefs. Such beliefs are often influenced by media coverage or publicity campaigns, and may be founded on an incomplete or inaccurate understanding of the issues. This type of "perceived risk" is the most difficult to address.

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[9] Sensitivity analyses are processes for assessing the range of potential outcomes resulting from an uncertain variable.

[10] See discussion in Part IV under operational planning (p. 29).

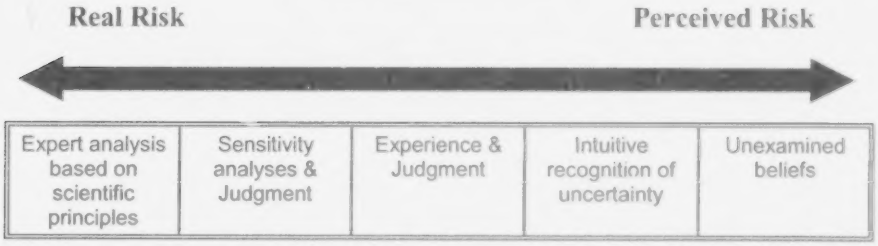
[11] For example, in proposing changes to their clearcutting practices, some licensees would appear to be responding to "perceived risks" as much as "real risks" associated with clearcutting.

[12] For example, the 40/60 ha default standards for cutblock size found in the Operational Planning Regulation would appear to have been enacted in response to "perceived risks" as much as "real risks" associated with cutblock size.

[13] As noted above, sometimes **judgment** is as important as **analysis**.

"Real risks" and "perceived risks" are not discrete categories. They represent instead a continuum of risks.

Risk Continuum



Acknowledging and addressing risks across the full spectrum of this continuum is one of the most important aspects of any risk management decision (see discussion in Part IV under operational planning)[14].

Conclusion

All in all, managing risk is a unique and challenging interplay of scientific, technical and managerial skills. Although good decisions are grounded in the best available scientific and technical information (including a sound understanding of the limitations and uncertainties of such information), "science" and "technology" must eventually give way to "art". The "art" of decision making draws on the decision maker's knowledge, experience, judgment, instincts and intuition.

However, in order to apply the principles of risk assessment and risk management to the province's public forests, it is first necessary to understand the **statutory framework** that governs the management of these public lands.

[14] pp. 28-30.

Part II The Statutory Framework – The Evolution of Forest Management in British Columbia

Introduction

The province's public forests (Crown forest land) is managed by the provincial government for the benefit of everyone in the province. In this regard, the government is like a trustee who holds legal title to and manages land on behalf of those who hold a beneficial interest in the land, which in the case of public land includes all members of the public.

In managing trust property, a trustee sometimes finds that the interests of the different beneficiaries of the trust coincide, in which case management of the trust property is a relatively straightforward exercise. However, all too often, the interests of the beneficiaries conflict, and management of the trust property proves to be a far more challenging exercise. Such is the case when it comes to the management of the province's public forests, and the complex interplay of environmental, social and economic values referred to in Part I.

Since at least 1912, the province's forest **tenure** system has been founded in **legislation**. However, prior to 1987, the **planning** of forest development operations and forest **practice standards** were based on a combination of **contractual** requirements and non-binding "industry" standards[15]. In this regard, some of the most critical components of the management regime were based on a kind of "**honour system**".

While there is nothing inherently wrong or inappropriate in a management regime for Crown forest land based on an honour system, it is predicated on the "other beneficiaries of the trust" having a high level of confidence in licensees and their foresters. During the 1980's, it become apparent that the requisite level of confidence was lacking. The public was no longer content to rely on this type of forest management regime.

[15] For example, standards for the protection of streams, wildlife, etc. recommended in guidelines prepared by government experts (in consultation with industry experts) were unenforceable unless specifically incorporated as contractual requirements into the tenure documents, which was usually not the case.

The first significant change to the management regime was the introduction in 1987 of statutory planning and practices requirements for soil disturbance and silviculture. However, management of other resource values continued to be based primarily on the honour system until the Forest Practices Code was brought into force in 1995. Since then, all aspects of forest management have been founded directly or indirectly in legislation.

Arguably, the two most significant aspects of the Forest Practices Code are:

- the **transfer of control** of forest management to the Legislature; and
- the **approach to risk management** underlying the legislation.

The Legislature Takes Control Of Forest Management

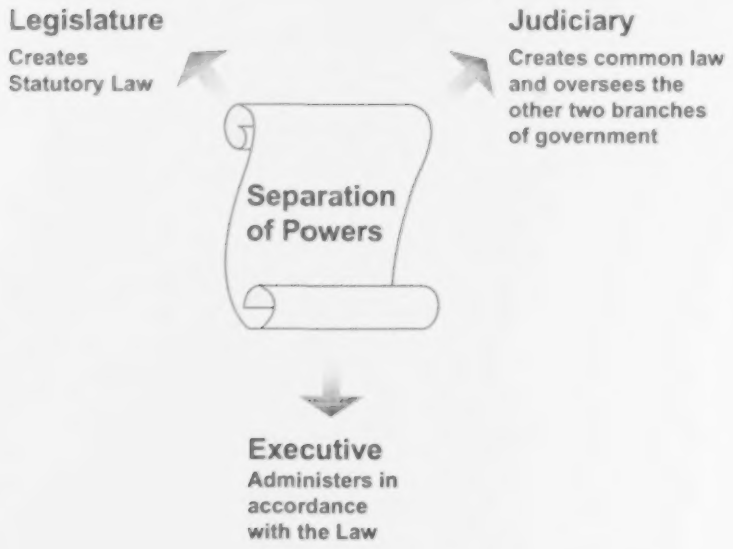
One of the most significant consequences of the enactment of the Forest Practices Code was the transfer of control of forest management from the Executive to the Legislative arm of government.

One of the defining features of our system of government is the separation of powers among three separate branches of government: the Legislature, the Judiciary and the Executive. The existence of, and relationship between, these three branches ensures we have "a government of laws and not of men". The principle behind this separation of powers was described by William Paley in 1785:

> "When these offices are unified in the same person or assembly, particular laws are made for particular cases, springing often times from partial motives, and directed to private ends... the consequence of which must be, that the subjects of such a constitution would live... without any known pre-established rules of adjudication whatever".

To this end, the power to "make law" is confined to two of the three branches of government: the Legislature and the Judiciary. The former does so by enacting statutes, while the latter is the interpreter of this "**statute law**" (legislation) and the custodian of a body of unwritten law called the "**common law**".

The third branch of government, the Executive, administers in accordance with the legislation enacted by the Legislature and the common law principles laid down by the Judiciary.



While the Cabinet is the supreme **Executive** authority, it is not the supreme **government** authority. The authority of the Cabinet is always subject to the authority of the Legislature and the Judiciary. With the enactment of the Forest Practices Code, the distribution of powers within the forest management context was fundamentally altered.

Henceforth, any change in the forest management regime will require the direct intervention of the Legislature. Furthermore, forest management decisions founded in legislation are by their very nature subject to public scrutiny (unlike contractual decisions which are essentially private) and the scrutiny of the Judiciary. Accordingly, anyone interested in "doing business" in the province's forests must now be prepared to do so in a kind of fishbowl – in full view of all the other "beneficiaries of the trust".

The Approach to Risk Management

In order to understand the approach adopted in the Forest Practices Code, it is helpful to understand the two basic approaches to risk management:

- "**Process based**"; and
- "**Results based**".

A process based approach attempts to manage risk (and uncertainty) by strictly regulating the "how-to's" as well as the goals of forest development through a detailed, government controlled planning process. All aspects of a licensee's plans, the "how-to's" as well as the goals, are regulated and enforced.

A results based approach attempts to manage risk through the clear articulation of goals, supported by key ("non-negotiable" and enforceable) practice standards. Only the goals and the key standards are regulated and enforced. The "how-to's" are left to the discretion of the licensees and their foresters.

Process versus results: Implications for planning

A process-based approach focuses the efforts and resources of licensees, their foresters, and Forest Service and other government officials on the **planning** stage. Every aspect of a licensee's operations, every "**how-to**", as well as every goal, must be planned and approved well in advance. This generally requires a heavy emphasis on the up-front **collection of information on every aspect of the licensee's operations** in order to facilitate this detailed planning process.

A results-based approach separates those aspects of planning that relate to the articulation of **goals** from those which relate to the "how-to's". Government approval is confined to the articulation of goals, while licensees are given both the freedom and the **responsibility** to select the most efficient and cost effective "how-to's" that will achieve those goals, **relying on their foresters rather than government approval** to determine the appropriateness of these "how-to's".

Process versus results: Implications for practices

In a process-based approach, the setting of forest practice standards is for the most part **subsumed in the planning process**. This in turn reinforces the need to extend government approval to every aspect of the licensee's operations in order to ensure the appropriateness of the forest practice standards incorporated into the licensee's plans.

In a results-based approach, where government approval is confined to the articulation of goals, planning is no longer the vehicle for establishing forest practice standards. Instead, the key ("non-negotiable" and enforceable) standards are **established in regulations**.

Approach used in the Forest Practices Code

When the Forest Practices Code was enacted in 1995, the approach to risk management was primarily process-based. However, in light of the experience gained in the first two years of administering the Code, the government decided that a move to a more results-based approach could be cost effective without compromising environmental standards. During 1997 and 1998, amendments were made both to the *Forest Practices Code of British Columbia Act* and to the regulations:

- Reducing the number of operational plans;
- Shifting the focus of the remaining plans away from the "how-to's" and towards the goals of forest management;
- Relying to a greater extent on the professionalism and expertise of the licensees' foresters to manage risk and uncertainty in preparing these plans;

- Limiting the number of mandatory assessment and information collection requirements and adjusting the timing of these requirements;
- Providing greater certainty in the approval of these plans by ensuring the underlying risk assessment and risk management decisions are only revisited when absolutely necessary; and
- Establishing some key ("non-negotiable" and enforceable) forest practice standards (e.g. for the protection of streams).

These amendments moved the underlying approach to risk management closer to a results based approach[16].

[16] For a comprehensive overview of these amendments, see the training materials prepared in the spring of 1998, on behalf of the Forest Practices Code Standing Training Committee, entitled **Streamlining the Code, a Summary of Legislative and Regulatory Changes Stemming From Bill 47**. For more information about these materials, contact the Training Manager, Forestry Division Services Branch, Ministry of Forests, 1st floor, 595 Pandora Avenue, Victoria, B.C. V8W 9C3.

Part III The Respective Roles of Government Officials and Licensees

Introduction

The Forest Service is the primary steward of the province's public forests, although responsibility in key areas is shared with other government agencies such as the Ministry of Environment, Lands and Parks.

While all members of the public are "beneficiaries" of this "trust property" (see discussion in Part II[17]), licensees have been granted certain rights which have not been granted to other members of the public. These rights include the right to harvest timber and the right to make key forest management decisions. However, with these rights come obligations, including an obligation to make wise forest management decisions based on sound risk assessment and risk management principles.

The following is a discussion of the respective roles of Forest Service and other government officials on the one hand, and licensees and their foresters on the other.

Role Of Forest Service And Other Government Officials

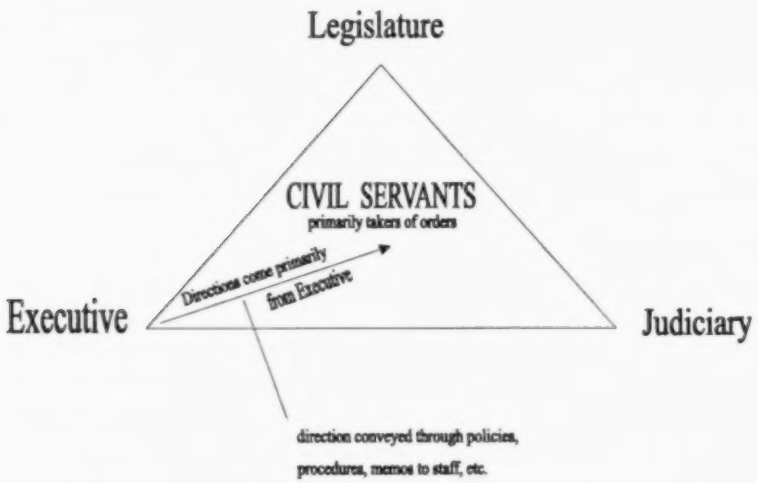
The enactment of the Forest Practices Code, and the resultant transfer of control of forest management from the Executive to the Legislature, has impacted the role Forest Service and other government officials in two important respects.

First, contrary to the perception of many, the shift to a statutory forest management regime has curtailed the discretionary decision-making powers of Forest Service officials, particularly district managers, while significantly increasing the complexity of those decisions by bringing into play a wide range of legal principles, including statutory interpretation and administrative law principles.

[17] p. 9.

Second, the transfer of control from the Executive to the Legislature has significantly impacted government's internal "reporting relationships". Before the Forest Practices Code, the Forest Service and other government officials involved in managing the province's forests received comparatively little direction from the Legislature or the Judiciary on forest management matters. In 1987, as a result of the amendments made to the *Forest Act*, that direction extended to soil conservation and silviculture matters. For the most part however, Forest Service officials and other government officials quite properly looked to the Cabinet, their minister and their ministry executive for direction. The role of the other two branches of government was secondary to the role of the Executive branch.

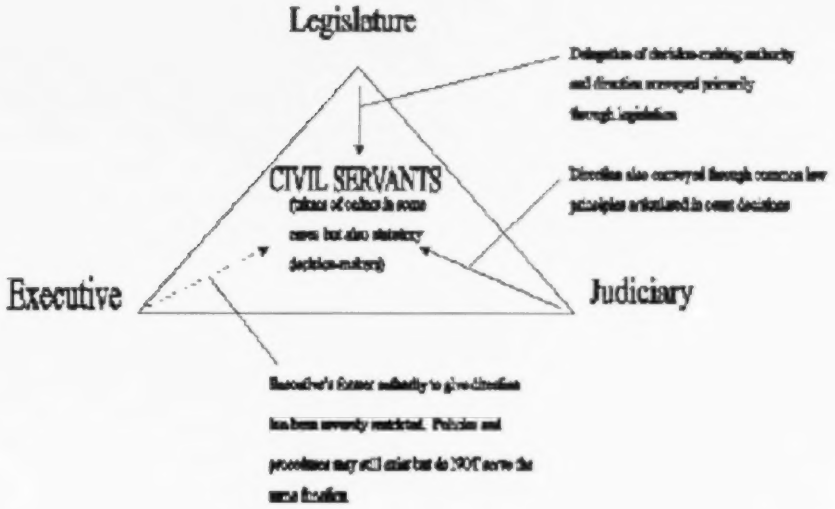
Pre-Forest Practices Code



On June 15, 1995, everything changed. When the Forest Practices Code came into effect, the role of the Legislative and Judicial branches of government became paramount. The Executive branch continues to have an important role but that role is now largely secondary to the roles of the other two branches of government. In particular, the Legislature has delegated decision making authority on a broad range of forest management matters to key government officials and, in many cases, has entirely excluded the Cabinet, the minister and the ministry executive from this decision-making process[18].

[18] The Legislature has also conferred some statutory decision making powers on the Executive, such as the power to establish certain types of higher level plans (see Part 2 of the *Forest Practices Code of British Columbia Act*). However, like any other statutory decision maker, in exercising these statutory powers, the Executive must still comply with the "orders" of the Legislature.

Post-Forest Practices Code



When acting in their capacity as statutory decision makers, district managers and other government officials in essence report directly to the Legislature, and are at the same time accountable to the third arm of government: the Judiciary (the courts).

While the Executive may provide much needed guidance, the "orders" district managers and other government officials must follow are embodied in the legislation itself. Those "orders" must prevail over any other considerations[19].

Many of the Legislature's "orders" bring into play the principles of risk assessment and risk management. The application of these principles to the role of Forest Service and other government officials is covered at length in the **Risk Management and the Principles of Statutory Decision Making Handbook** (October 1998)[20].

Role of Licensees And Their Foresters

Licensees are the proponents of operational plans. When a licensee submits an operational plan to a district manager or another designated government official for approval, **it is still the licensee's plan**. It is not the official's plan. The legislation places control of, and accountability for, most key planning decisions in the hands of the licensees and their foresters.

[19] It is true that these "orders" often rely upon a district manager or another government official to exercise judgment and sometimes even discretion, but always in accordance the intent of the legislation and any specific criteria laid out in the legislation.

[20] See note 2 above.

Within the range of acceptable practices and the limits of acceptable risk recognized in the legislation, licensees and their foresters have the freedom, as well as the responsibility, to decide on the most appropriate course of action. They are also responsible for the proper execution of those decisions.

Of course, the statutory decision makers (the district managers and designated environment officials) still have the role of evaluating a proposed operational plan to ensure that it meets the requirements of the legislation and that it adequately manages and conserves the forest resources.

Given these inter-linking roles, there is clearly a need for effective communication between licensees, their foresters, and Forest Service staff both during the development and approval of operational plans and during the implementation of those plans.

In the **Risk Management and the Principles of Statutory Decision Making Handbook** (October 1998)[21], risk assessment and risk management is promoted as a "way of thinking", as an approach to making and defending statutory decisions. To improve the interaction and communication between licensees and their foresters, it is important that licensees' decisions also reflect risk assessment and risk management principles.

Assessing the risk to environmental, social and economic values and subsequently managing those risks through plan development has a number of advantages for the licensee (see discussion in Part IV)[22].

The assessment of risk can also provide key information to the planning forester when deciding, for example, the appropriate measures for protecting forest resources (section 10(1)(c)(ii) of the FPC). In determining and implementing these measures, the risks to the resources can be managed.

Understanding the risk assessment and risk management principles can also be useful in deciding which public or agency referral comments need to be addressed in a proposed plan.

In addition, articulating planning decisions to Forest Service officials using the language of risk assessment and risk management can prove helpful given the use of these principles by Forest Service officials in making operational plan approval decisions.

Risk assessment and risk management principles may also prove helpful to licensees in determining their priorities for their own internal "quality assurance" inspections. They can also be used in ensuring that plans are being implemented as anticipated, and that practices are being conducted in accordance with the regulations.

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[21] See note 2 above.

[22] Part IV (pp. 23-37) discusses the four risk management stages under the Forest Practices Code.

With the evolution of the Forest Practices Codes towards a more "results" based approach (see discussion in Part II)[23], it is anticipated that the Forest Service will shift its focus more towards compliance and enforcement activities. For this reason, it is increasingly important that licensees and their foresters ensure their operational plans set a high standard for quality, and also ensure these plans are properly implemented to achieve the desired results.

However, this does not mean licensees should become "risk adverse". Rather, the **quality of these plans should turn on the quality of the underlying risk assessment and risk management decisions**. In turn these decisions should reflect acceptable risks that will provide the benefits of lower operating costs without unduly affecting environmental and social values.

Several former planning requirements have been removed from the Operational Planning Regulation and now appear as corresponding practices in the practices regulations. In most instances, the practices requirements will apply regardless of anything to the contrary in an approved operational plan. Accordingly, it is in the licensee's best interests to ensure that their plan satisfies all the legal planning requirements, but also that the objectives in the plan are **achievable on the ground**.

Licensees cannot merely rely on Forest Service staff to catch errors or shortcomings in an operational plan. Approval of an operational plan, in all but the rarest of circumstances, will **not** shift liability away from the licensee who "owns" the plan (or in certain circumstances from the forester who prepared it.)

In order to achieve the requisite high standard of quality for their plans, both licensees and their foresters must be sufficiently knowledgeable about the legislation to be able to **fulfill their legal obligations** – and also **stand up for their legal rights**.

This can be done without compromising, and perhaps may even improve, working relationships with Forest Service staff.

In this context, misunderstanding what one is legally **required** to do as opposed to what one may voluntarily **choose** to do can lead to uncertainty and frustration. If licensees and their foresters clearly understand the legal basis for their planning and practices decisions, they will be better able to articulate their reasoning to Forest Service staff, making it easier for the government to evaluate and approve the plan. A good way to do that is for the licensee's forester to specify as much as possible his or her understanding of how the plan meets the strict legal requirements, – and also where it may provide for "measures" that exceed these strict legal requirements.

This in turn requires the forester to have the knowledge and skill to recognize those opportunities where environmental and social risks can be mitigated with little or no additional expense to the licensee. The results are likely to be better communication, less recycling of "draft" plans back and forth between licensees and the Forest Service,

[23] pp. 11-13.

less duplication of effort, and accordingly greater efficiency and more defensible forest management decisions.

Professional Accountability

Professional foresters working for licensees must balance a number of professional and ethical responsibilities. The Code of Ethics of the Association of British Columbia Professional Foresters (the Association) recognizes the foresters responsibilities to the public, to the Association, to the client or employer, and to fellow members.

Where the interests of these various parties are in conflict, it is up to the professional forester to exercise his or her best judgment as to the proper weight to give to each of these responsibilities considering the particular circumstances.

Risk assessment and risk management principles provide a structured and disciplined framework within which to assign the relative weighting in the context of complicated forest management decisions. This organized approach:

- helps the professional forester make better decisions because of the way it tends to separate the relevant from less relevant considerations;
- helps to achieve "buy-in" from the affected parties since it allows them to see and understand the decision making process; and
- makes the decision more defensible in the event it is challenged.

An understanding of risk assessment and risk management, coupled with a knowledge of statutory interpretation and administrative law principles, allows the professional forester to understand the environmental, social, and economic choices underlying the *Forest Practices Code of British Columbia Act*.

In addition, if the professional forester has expressed his or her forest management decisions in terms of risk assessment and risk management principles, he or she will be in a better position to stand up for the decision – against Forest Service or other government officials if necessary – and also against the licensee if necessary.

During the preparation and evaluation of operational plans, foresters working for licensees and foresters working for the Forest Service must all keep in mind the nature of the statutory resource management regime within which they are operating. If one knows how to interpret it properly, the Forest Practices Code describes the acceptable range of forest management options available. As long as the licensees' proposals fall within that legally defined acceptable range, they are entitled to have them approved.

However, as part of their professional responsibility to balance the interests of the public as well as the employer or client, it is desirable for the foresters to identify opportunities for exceeding the strict legal requirements where better resource management results can be achieved with the concurrence of the licensee. Both in

determining the limits of the strict legal requirements, and in exploring achievable results beyond those mandatory limits, professional foresters for each of the parties should maintain a professional relationship, and should recognize that they are all trying to solve the problem of balancing the interests of all interested parties.

Part IV The Four Risk Management Stages under the Forest Practices Code

Introduction

Under the Forest Practices Code, risk is managed at four distinct stages:

1. During the development of the legislative framework;
2. When operational plans are prepared and approved;
3. During compliance activities, including licensees' internal "quality assurance" inspections as well as inspections carried out by Forest Service and other government officials; and
4. When enforcement actions are taken by Forest Service or other government officials.

These steps are to some extent hierarchical. How risk is managed at earlier stages will determine in part how it will have to be managed at later stages.

Stage 1 – Developing the Legislative Framework

Risk management decisions made by the Legislature in developing the legislative framework have the **force of law**. If the legislation prescribes a certain standard for a particular forest practice, or a certain approach to risk management, it is not within the power of Forest Service or other government officials, or licensees or their foresters, to "negotiate" a different standard or approach.

However, the Forest Practices Code varies:

1. in its treatment of different issues and values,
2. in the level of detail specified for certain issues or values, and
3. in the level of discretion accorded to licensees, their foresters and Forest Service officials and other government officials to address certain issues or values.

Sometimes, the Forest Practices Code is **very explicit in identifying acceptable and unacceptable levels of risk**. For example, consider how it deals with riparian reserves zones. The legislation dictates that harvesting outside of these reserve zones is generally acceptable (depending on the circumstances), while harvesting inside these reserves zones is (with some very limited exceptions) unacceptable.

The underlying risk management decision – weighing the relative impact on environmental and economic values – is not open to "re-negotiation".

On the other hand, the legislation sometimes allows for discretion in determining acceptable and unacceptable levels of risk. For example, consider how the legislation deals with clearcutting. Section 8(2)(a) of the Timber Harvesting Practices Regulation (THPR) states:

> 8. (2) A person must not clearcut an area that is outside a community watershed if the result of the terrain stability field assessment indicates that the area is subject to a high likelihood of landslides, unless
>
> (a) the terrain stability field assessment documents the assessor's opinion that, based on the assessment, the assessor has reasonable grounds to believe that clearcutting the area will not significantly increase the risk of a landslide and that there is a low likelihood of landslide debris
>
> (i) entering into a fish stream or a perennial stream that is a direct tributary to a fish stream, or
>
> (ii) causing damage to private property or public utilities, including but not limited to roads, bridges, transmission lines, pipelines, recreation sites or any other similar structures…

Here, the legislation establishes a general prohibition on clearcutting, but provides for an exemption from this prohibition that turns on the judgment of an expert in terrain stability field assessment. This exemption provides **licensees** with both the freedom and the responsibility to determine whether there is an acceptable or unacceptable level of risk.

In other cases, the legislation confers a discretion **on Forest Service or other government officials** to determine whether there is an acceptable or unacceptable level of risk, e.g. in allowing for variances in certain circumstances from some of the requirements laid out in the THPR.

Given this variation in the Forest Practices Code, one of the most important tasks shared by licensees, their foresters, and Forest Service and other government officials is to correctly interpret the legislative framework within which their risk management decision must be made.

In particular, licensees, their foresters, and Forest Service and other government officials must all understand:

- those risk management decisions which have already been made in developing the legislative framework;
- the level of discretion conferred on licensees and their foresters, or on Forest Service and other government officials, to make risk management decisions;
- the criteria which must be met in exercising any discretion conferred under the legislation;
- those decisions which rest with licensees and their foresters; and
- those decisions which rest with Forest Service and other government officials.

Stage 2 – Operational Planning

The operational planning stage provides the greatest opportunity for those who are willing to take risks to achieve the greatest benefits — and to incur the greatest losses. For this reason, the essence of operational planning is the proper application of risk assessment and risk management principles to appropriately balance benefits against potential losses.

Taking a risk management approach and documenting it in a plan, has four advantages for a licensee:

- It helps to ensure the cost effectiveness of the proposed operations;
- It helps to demonstrate due diligence;
- It helps the public reviewing a plan to understand the risks associated with the plan; and
- It provides the district manager or other designated government official who must approve the plan with the information that may help him or her determine if the plan adequately manages and conserves the forest resources.

The following is a brief overview of the key stages in the operational planning process. In many respects, these steps incorporate the risk assessment and management steps described in Part I.

Step 1 – Identifying the Values at Risk

The first step in the operational planning process occurs long before the preparation of the plan, when resource values requiring special treatment are identified. These resource values may be identified through one of the legal mechanisms provided for in

the Forest Practices Code, or they may be identified by the licensees or their foresters on a strictly voluntary basis.

For example, one of the legal mechanisms provided for in the Forest Practices Code is making the resource value "known" for the purposes of the Operational Planning Regulation (OPR).

"Known", when used in a section of this regulation to describe a feature, objective or other thing, means:

- Contained in a higher level plan; or
- Otherwise made available by the district manager or designated environment official at least four months before the operational plan is submitted for approval.

Accordingly, if there is a feature, objective or other thing described in a section of the regulation as "known", and the district manager or designated environment official wants a licensee to address it in an operational plan, he or she must have a process in place to advise the licensee at least four months prior to submission of the operational plan (unless of course it is already contained in a higher level plan).

If a feature, objective or other thing is **not** referred to in a section of the regulation as "known", the district manager or designated environment official cannot use this legal mechanism to **direct** licensees to address it in their operational plans, although licensees or their forester may still choose to address it on a strictly voluntary basis. This is an example of how the legislation dictates risk management decisions with respect to some issues and allows discretion in making risk management decisions with respect to others.

At this stage, a prudent licensee will also identify other important values that may not be expressly referenced in the legislation. In particular, this is a good time to consider the kinds of social values that may be raised during the review and comment process, as well as key economic values, including the licensee's own economic interests as well as the economic interests of others.

Step 2 – Assessing the Risk

The next stage in the planning process is assessing the risk to the values identified in Stage 1. This includes the completion of those assessments which are required for the purpose of preparing the operational plan, and consideration of appropriate measures to protect the forest resources based on the assessed risk to these and other environmental, social and economic values.

Section 17 of the Forest Practices Code makes it clear that the only assessments that **must** be carried out are those required by the OPR. These include a number of mandatory assessments, as well as some discretionary assessments that a district manager can require, such as a forest health assessment under section 13 of the OPR, or

an archaeological impact assessment under section 37(1)(e). Efficiency and procedural fairness dictate that the district manager's requirements with respect to assessments be reasonable and be communicated to the licensee well in advance of plan preparation.

In carrying out the assessments required under the OPR, the licensee and the licensee's forester should pay close attention to the concept of the "area under the plan". In its decision regarding the Brooks Bay/Klaskish (Appeal No. 96/04(b), June 11, 1998) the Forest Appeals Commission (the "Commission") looked at the meaning of this phrase in section 13 (now section 9) of the OPR, which states:

> 13. (1) A person must ensure that a forest development plan addresses an area sufficient in size to include all areas affected by the timber harvesting and road construction or modification operations proposed under the plan. [emphasis added]
>
> (2) If the district manager determines that the area under the plan does not meet the requirements of subsection (1), the district manager may, in a notice given to the person, specify the area that the plan must address.

The Commission concluded that the "plan" and the "area under the plan" are the same thing. The area, after it is initially identified or defined by the licensee, does not change (except as may be directed by the district manager pursuant to OPR Sec. 9(2)). Where assessments are required for the "area under the plan", this area must be large enough to include all the areas affected by the proposed timber harvesting and road construction or modification activities, and the resources in the entire area must be identified in accordance with the legislation. It is not adequate merely to address the cutblocks themselves and the areas immediately adjacent to the cutblocks.

The Commission also noted, however, that not all assessments are required for the entire "area under the plan". Licensees, their foresters and Forest Service officials must look to the specific legislative requirements to see whether the information is required for the entire area under the plan, for an area under the plan, or just for the cutblocks or roads themselves.

In addition to the assessments required by legislation, a prudent licensee will also assess the risk to other important values that may not be expressly referenced in the legislation, such as the social or economic values referred to in Step 1 above.

Step 3 – Making Risk Management Decisions – Preparing the Operational Plan

Once the legislative requirements for assessments have been met, licensees and their foresters may proceed to draft their operational plans in accordance with the content requirements set out in the Forest Practices Code and the OPR. These requirements are very explicit and cannot be added to by Forest Service staff or other government officials except as expressly provided for in the legislation[24].

[24] This point was also made by the Commission in the Brooks Bay/Klaskish decision (Appeal No. 96/04(b), June 11, 1998) referred to above.

However, this does not mean that the licensee or the licensee's forester is entitled to ignore relevant information that bears on the assessment and management of risks to any environmental, social or economic values that could be impacted by the operational plan. It simply means that information over and above the content requirements set out in the legislation is included at the sole discretion of the licensee and the licensee's foresters, subject to the final approval of the district manager and, in some cases, a designated environment official. In this regard, the legislation provides licensees and their forester a broad scope within which to apply risk assessment and risk management principles.

In making decisions based on these risk assessment and risk management principles, licensees and their foresters should be mindful of all values (environmental, social and economic) that may be impacted by their actions or decisions, and recognize how a decision to decrease the risk to one value may increases the risk to another value.

For example, consider the interplay between economic and environmental risks. In selecting appropriate options for dealing with environmental risk, licensees should bear in mind the relative costs of their proposed operations, not just with respect to the particular issue before them, but also with respect to the "big picture" impacts their decisions may have on stumpage rates. When presented with two different options — aerial logging versus conventional logging — a narrow view might lead a licensee to opt for the more costly aerial system, because the higher appraisal cost allowance may result in a lower stumpage rate, which would offset the higher costs associated with this system. As a result, it may appear to be an attractive option for minimizing the risk to environmental values.

However, the decreased risk to environmental values may be insufficient to offset the increased risk to economic values. In many cases, an economic analysis would demonstrate that this type of decision simply passes the cost on to other licensees by raising their stumpage rates (because of the so-called "waterbed effect" associated with the province's comparative value pricing system), which in turn leads to long term increases in stumpage rates for all licensees, a phenomenon generally referred to as "cost creep".

"Cost creep" results when individual licensees opt for high cost alternatives for the reasons cited above. The licensee benefits from the higher appraisal cost allowance in the short term, but the mechanics of the comparative value pricing stumpage system cause the base rate for all licensees in the appraisal area to increase at the next quarterly adjustment. In other words, the additional cost of these higher cost forest management decisions is not borne by government, but is passed on to all licensees. When most or all licensees are making unnecessarily high cost, risk averse decisions, "cost creep" has the effect of ratcheting stumpage rates upwards.

Making appropriate risk management decisions during the preparation of an operational plan will be complicated by **uncertainty**. However, uncertainty doesn't have to

paralyze the operational planning or decision making process. Since some level of uncertainty will always exist, the preferred approach is to acknowledge and manage uncertainty as best as possible. In some situations the uncertainty may not affect the final outcome but it should still be acknowledged.

For example, it may happen that although there is a large degree of uncertainty associated with an issue such as whether a stream is a class 2 or 3, its ability to impact the result may be quite limited. The area that may require a different riparian reserve zone width may have slope stability concerns and thereby be reserved from harvest anyway. Conversely, some small areas of uncertainty can have drastic impacts on the end result and thereby require a detailed statement of assumptions, careful analysis, and subsequent management. The process of considering the range of potential outcomes resulting from an uncertain variable is called a **sensitivity analysis**.

Although in some fields sensitivity analysis can be mathematically modeled, the uncertainties associated with operational planning do not generally lend themselves to mathematical modeling. Instead, the challenge is to determine the sensitivity of the final outcome to the uncertainties and make the best decision given these uncertainties. If, regardless of the uncertainties, it is determined that the final outcome is the same, the decision is not sensitive to these uncertainties. If, on the other hand, as a result of the uncertainties, it is determined that the final outcome could vary, then the decision is senstitive to these uncertainties. Where there is sensitivity, greater consideration will have to be given to the uncertainties by the licensee in developing a plan, and by the statutory decision maker in approving a plan. This consideration requires the licensees, their foresters and Forest Service officials alike to use their judgment when making decisions.

Another important consideration is the input received from the public through the review and comment process. Often, this input is the only source of information regarding important social values. In addition, it may well provide important information regarding environmental and economic values of which the licensee was previously unaware. For these reasons, such input must be considered.

The question then becomes how much weight the licensee and the licensee's foresters should give this information, and how much weight a district manager or designated environment official might reasonably be expected to give this information. The legislation provides little explicit guidance in this regard.

Evaluation of this input is complicated by the fact that it will often fall into the "perceived risk" category. The weight that should be given to "perceived risks" largely depends on whether or not there is compelling supporting information. Generally, "perceived risks" will deserve less weight if they are really nothing more than "unexamined beliefs"[25]. However, "perceived risks" may deserve considerable weight if they reflect knowledge borne of experience, or an intuitive recognition of uncertainties that were overlooked during the preparation of the plan.

[25] See discussion of the different types of "perceived risk" on pp. 7-8.

Communication is an important tool in dealing with "perceived risks", particularly as the distinction between the different types of "perceived risk" may be lost on the public if they are not adequately explained. By accurately describing "real risks" and compelling "perceived risks" to the public, complete with all the associated uncertainties, licensees, their foresters, and Forest Service and other government officials may be better able to manage the less compelling types of "perceived risks".

In addition, by providing the public with information on their application of risk assessment and risk management principles, licensees may be able to allay many public concerns regarding their proposed operations.

Step 4 – Approving the Operational Plan

The Forest Practices Code includes a final step in the operational planning process: approval by a government official (usually a district manager).

When the operational plan is submitted for approval, Forest Service staff (and in many cases staff from other government agencies) are responsible for evaluating the plan and providing their comments based on risk assessment and risk management principles. If potential problems are identified, it is expected that these officials will contact the licensee's forester to discuss potential solutions. However, these officials do not have the authority to approve or reject the plan — or to require the licensee's forester to adopt their suggestions. The authority to approve or reject the operational plan rests solely with the statutory decision maker, which is usually the district manager and, in some cases, a designated environment official.

A written rationale is generally the final component in the operational planning process. The district manager's (and in some cases the designated environment official's) assessment of the gravity and magnitude of the issues considered in approving (or not approving) the plan will be the primary factor in determining how extensive or detailed the rationale should be. The rationale may also be the key to successfully defending the district manager's (or designated environment official's) decisions against any legal challenge.

Stage 3 – Compliance

While public attention is often captured by the enforcement aspects of the Forest Practices Code, it is in fact the compliance activities of licensees and Forest Service officials alike that are the most critical to its success.

> Compliance activities have three main purposes:
> - To promote compliance;
> - To avert non-compliance before it occurs; and
> - To detect and address non-compliance when it does occur.

It is important to recognize that risks still exist after an operational plan has been approved. While the extent to which risk is managed at the planning stage will dictate how well risk can be managed at the compliance stage, there are some additional risks that need to be considered at the compliance stage, including:

- The risk that the plan won't be implemented properly;
- The risk that the plan is simply wrong (and therefore needs to be amended) and;
- The risk that the forest practice standards set by the legislation will not be met.

The extent to which these risks may affect environmental, social and economic values will depend on several risk factors. These include the licensee's performance capabilities, timing constraints, site specific issues, unusual climatic events and market conditions. These factors are considered by the Forest Service, and should be considered by licensees, when assessing risk for the purpose of prioritizing their inspections.

A licensee's own inspections will provide a **feedback loop** enabling the licensee to continuously reassess risk **while operations are under way**. These inspections can also provide a **feedback loop into the planning process**. Information regarding the risks related to certain harvesting methods or practices is often discovered during plan implementation.

It is also important to keep in mind that, because of the allocation of risk under the Forest Practices Code and the importance of being able to demonstrate that due diligence was exercised[26], licensees cannot rely solely on the Forest Service's inspections to identify potential non-compliance. They are no substitute for the licensees' own inspections.

Similarly, licensees cannot absolve themselves from potential liability or accountability by transferring their responsibilities to their contractors or consultants. While

[26] See discussion under Stage 4 – Enforcement on pp. 35-37.

contractors and consultants may have their own liabilities and accountabilities, they cannot be made to assume those which properly rest with the licensees.

In assessing risk at the compliance stage, licensees may wish to adapt the six-step process used by Forest Service staff[27].

Step 1 – Identification of Values and Potential Detrimental Events

To determine inspection priorities, it is necessary to first identify the values that exist on or adjacent to the site where the proposed activities will occur. These values may include things like a fish stream, water quality, a recreation trail, a range development, a public road, etc. Ideally, this information will be readily available from the plans or from the foresters that have been on site.

To ensure all possibilities are considered and uncertainty is most effectively managed, the identification of potential detrimental events should be approached as a brain storming exercise. The question to answer is:

> What could possibly go wrong?

Potential detrimental events include:

- Blow down of trees in the reserve zone or wildlife tree patches;
- Mass wasting causing sediment to enter a stream; and
- Unauthorized harvest in a reserve zone.

Some of these potential detrimental events may have been identified and managed for at the operational planning stage. If so, it is still useful to acknowledge these events again at the compliance stage. Their likelihood of occurrence may be low because of the mechanisms included in the plan to prevent them from occurring (see next step below). However, since some time will usually have passed between the preparation of the plan and its implementation, new information may have presented itself. Public and agency referral comments received during the planning stage may also be helpful in ensuring that all potential detrimental events are identified.

Step 2 – Determine the Likelihood

At this step, the likelihood of each detrimental event occurring needs to be determined. Clearly, it is impossible to predict with certainty the exact probability of an event occurring. However, using judgment, the likelihood should be narrowed to at least a high, moderate or low rating. Again, there may have been some consideration of likelihood at the planning stage and, as a result, the proposed activities may have been designed to manage the likelihood of potential detrimental events occurring. However,

[27] See discussion in Part I on p. 5.

adjustments to likelihood may still be required at the compliance stage to account for any factors that may have been missed previously or which have changed over time.

It is also necessary to consider the likelihood of potential "uncertainties". For example, it may be useful to consider the likelihood that the plan is flawed or the likelihood that the plan will not be implemented as described.

Step 3 – Determine the Magnitude of the Potential Consequence

At this stage, it is necessary to assume for the purposes of the risk assessment that each of the potential detrimental events will occur. Then the magnitude of the consequence to each of the identified values can be considered. The determination of the magnitude of consequence is dependent on two primary factors: **impact** and **time** (or duration).

Generally, activities which could result in detrimental events whose potential impact or duration is unacceptable should be an inspection priority, regardless of the likelihood of the detrimental event occurring. For example, let's assume the value at risk is water quality at a known licensed domestic water supply intake for a community and there is no alternative intake. The impact of any damage to that water quality, even for a short period of time, could be significant. Therefore, any activities that could adversely affect the water quality should be closely monitored.

Step 4 – Determine the Initial Risk Rating

An initial risk rating can be determined using the formula and table shown in Part I[28]. Although the initial risk rating will determine whether the risk to a value is very high, high, moderate or low, that rating alone is not useful or informative without the information considered in the previous steps.

Step 5 – Adjust the Initial Risk Rating

A number of risk factors (e.g. timing, performance, market conditions, etc.) may affect the initial risk rating both at the operational planning and the compliance (inspection) stage. Such risk factors may increase or decrease the risk.

There may be some risk factors which were not relevant at the operational planning stage, but which subsequently become very relevant at the compliance stage. It may also be necessary to give factors initially identified at the planning stage a different weight at the compliance stage.

For example, weather conditions may not be a relevant factor in developing a plan, but may become a very relevant during implementation. A particularly wet spring may significantly increase the risk of soil disturbance and may therefore become an important consideration in prioritizing inspections.

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[28] See p. 6.

Step 6 – Determine the Final Risk Rating

The final risk rating is the overall risk to environmental, social and economic values respectively, i.e. there will be an environmental risk rating, a social risk rating and an economic risk rating. **At** the compliance stage, the final risk rating is continually re-examined as new information becomes available during implementation or inspections. As with the initial risk rating, the final risk rating is not useful or informative without the information considered in the previous steps.

Results-based Approach

It is also important to keep in mind the implications of the shift in the Forest Practices Code towards a more "results based" approach. The focus of compliance activities will largely depend on whether they are carried out in the context of a "process-based" or "results-based" legislative framework[29].

In a process-based framework, compliance is, for the most part, measured against the "how-to's" set out in a plan rather than the forest management goals or results the plan is intended to achieve.

In turn, any subsequent enforcement action will largely focus on the "how-to's" rather than the results. In consequence, a licensee who achieves excellent results may still find themselves in contravention of the Forest Practices Code because of a failure to follow the approved "how-to's" while a licensee who failed to achieve the desired results may still be found in compliance because the approved "how-to's" were followed (even though they didn't happen to produce the anticipated result). It is for reasons such as these that early advocates for a results-based forest management regime can be found among the government's own compliance and enforcement staff.

In a results-based framework, the initial focus is on the forest management goals themselves. Were they achieved or not?

Based on the answer to that question, attention may then turn to the "how-to's for the purpose of assessing performance. Also, a greater emphasis is placed on detecting problems that may impede achievement of the desired results. For these reasons, compliance in a results-based regime becomes a far more complex, but certainly a more interesting and hopefully a more effective exercise.

As noted above, recent amendments to the Forest Practices Code[30] have moved it closer to a results-based approach, which in turn has caused compliance staff within the Forest Service to start shifting their focus away from process towards results. Licensees must also adjust their focus accordingly.

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[29] See discussion in Part II on pp. 12-13.

[30] See note 16 above and accompanying text on p. 13.

Communication

Communication between licensees, their foresters and Forest Service staff during their respective inspections can be extremely helpful to all parties. Inspections are an opportunity for healthy discussion and joint problem solving based on mutual respect and professionalism. Detection and resolution of a problem or potential problem should be a cooperative and not an adversarial process.

Finally, it is important to keep the following in mind: **If compliance is working as it should, enforcement should not be needed**. Each time an enforcement activity is undertaken, a question should be asked by licensees, their foresters and Forest Service staff alike: **Why did compliance fail?**

Stage 4 – Enforcement

The Forest Practices Code's approach to enforcement goes beyond concepts such as "fault". Any failure to meet a Code requirement, even when the failure is not a licensee's "fault" (i.e. not due to "poor performance" or lack of "due diligence"), is a contravention of the Code. In this regard, the risk of failure to achieve the goals or meet the forest practice standards that have been set for the licensee (either in the licensee's own plans when they are approved by a government official or in the regulations) is borne by the licensee rather than the public. Although at first glance this may not seem fair to licensees, it is one of the costs associated with the right to harvest public timber. From the public's perspective, it might be considered even more unfair if the public were asked to bear this cost. Also, some Code requirements have their own built in "limitation of liability"[31].

This is not to say that issues of "fault" are not considered, but they are not necessarily relevant in every case. This is because of the Forest Practices Code's two-tiered approach to enforcement. It includes both:

- Administrative remedies (stopwork orders, remediation orders, administrative penalties, suspension and cancellation of licences, denial of cutting permits, etc.) which are available to Forest Service and other government officials to address contraventions regardless of whether or not a licensee is at "fault"; and
- Prosecutions for offences, where the Courts have the power to impose fines or even prison terms, but only when a licensee is at "fault".

Administrative remedies

The administrative remedies regime provided for under the Forest Practices Code, as originally designed when the Code was brought into force in 1995, was primarily a vehicle for allocating risk. (In this regard, the Forest Practices Code carries forward the

[31] For example, consider section 8(2) of the THPR, quoted on p. 24, where liability for clearcutting on potentially unstable terrain is limited by this section's use of expert advice.

risk allocation principles that existed in the pre-Code contractual forest management regime.)

A suitable analogy might be the allocation of risk between a buyer and seller under a shipping contract. The seller bears the risk until the goods reach the specified delivery point, after which the buyer bears the risk. If something goes wrong and the goods are damaged in transit, liability does not turn on whether the seller or the buyer is to blame or is a "poor performer". Liability is based solely on the pre-determined allocation of risk. If the goods are damaged before they reached the delivery point, then the seller is liable. If the goods are damaged after they reached the delivery point, then the buyer is liable.

Under the Forest Practices Code, there are similar risk allocation principles at work. Take reforestation, for example. It is not necessary to get into the issue of who is or is not a poor performer in order to determine who is responsible for addressing a beetle infestation problem. If the beetle infestation occurs before a stand reaches free-growing, then the licensee is liable. If it occurs after the stand reaches free-growing, then the government assumes the liability.

Unfortunately, there is a general lack of understanding of the risk allocation principles in the Forest Practices Code. There is a tendency to equate risk allocation with blame. Many assume that liability under the Code is related solely to performance, and construe every contravention as evidence of poor performance.

This confusion is fostered in part because certain administrative remedies, primarily administrative penalties, can also be used to sanction poor performance. While the primary function of these penalties is to compensate the government (and hence the public) when the risk lies with the licensee, these penalties can include a deterrent component if the licensee has been at "fault". In this regard, these penalties have blended "compensatory" and "deterrent" functions.

Obviously, a deterrent component should never be included in an administrative penalty unless the licensee is at "fault", i.e. has failed to exercise "due diligence". However, because of the blended nature of these penalties, it is impossible for reporting purposes to distinguish those penalties which are purely compensatory in nature from those which include an additional deterrent component. As a result, some people assume that all administrative penalties are evidence of poor performance. In this regard, administrative penalties are often equated to the fines levied by the courts upon conviction for an offence.

In order to address this misconception, amendments to the Forest Practices Code were passed in 1997 which split the blended penalty into separate compensatory and deterrent penalties[32]. The former are a pure reflection of the risk allocation principles in the Code. The latter are a vehicle for addressing poor performance, and will only be

[32] These amendments have not as yet been brought into force, but it is anticipated that they will be brought into force in 1999.

imposed if licensees are unable to demonstrate that they exercised due diligence. To this end, the amendments to the Code introduce a performance evaluation determination based on the due diligence test. This performance evaluation determination is made whenever a Forest Service or other government official finds that a licensee has contravened the legislation.

The performance evaluation process should enable licensees, the government and the public to distinguish "no-fault" contraventions from "fault" contraventions. This in turn should enable them to distinguish those licensees who are "good performers" (in spite of being held liable for a contravention) from those who are "poor performers" (who are not only liable for a contravention, but are also at "fault" because of a lack of "due diligence").

A results based approach to risk management depends largely on the performance of licensees. Accordingly, the objective of the amendments to the enforcement provisions of the Forest Practices Code is to ensure that performance is evaluated appropriately in order to assess whether the trust the government has placed in licensees in moving towards a results based Code is justified. At the same time, it is hoped that this process will enable good performers to vindicate themselves, if necessary, in the eyes of their customers, their shareholders and the public.

Prosecution

The Forest Practices Code also provides for the prosecution of offences. The offence provisions of the Code give the Courts the power to impose fines and even imprisonment upon conviction. The purpose of these penal or "quasi-criminal" sanctions is to redress a serious wrong done to society. Such sanctions are only appropriate when licensees are clearly at "fault", and where the degree of "fault" warrants public censure. The Forest Practices Code specifically provides for a "due diligence" defence to a prosecution to ensure a licensee who is not at "fault" is not found to have committed an offence: Section 157(2) of the *Forest Practices Code of British Columbia Act*.

Conclusion

Finally, it is important to recognize that the enforcement stage is not the stage at which licensees, their foresters, or Forest Service or other government officials should try to "re-negotiate" a licensee's rights or obligations. To the extent these rights and obligations are "negotiable", they should have been determined at the operational planning stage. It is generally not appropriate to attempt to amend plans or approvals solely to bring a contravention back into compliance.

As for standards which are expressly set out in the legislation, such as the prohibition on harvesting in a reserve zone, such standards are never "negotiable".

Part V The "Legal Tool-kit" – The Principles of Statutory Interpretation and Administrative Law

Introduction

In order to effectively manage risk within a statutory framework, licensees and their foresters should become familiar with the legal principles that govern this framework, the most important of which are the principles of statutory interpretation and administrative law.

The principles of statutory interpretation are the key to understanding:

- those risk management decisions which have already been made in developing the legislative framework;
- the level of discretion conferred on licensees and their foresters, or on Forest Service and other government officials, to make risk management decisions;
- the criteria which must be met in exercising any discretion conferred under the legislation;
- those decisions which rest with licensees and their foresters; and
- those decisions which rest with Forest Service and other government officials.

The principles of administrative law:

- Sets limits on the actions and decisions of government officials;
- Sets standards of fairness for the conduct of these officials; and
- Provides remedies for those affected by the actions or decisions of these officials.

Principles of Statutory Interpretation

Licensees and their foresters must conduct their affairs, and Forest Service and other government officials must exercise their authority, in accordance with the requirements

laid down by the Forest Practices Code. However, at times, the legislation may not be quite as clear as desired. Nonetheless, they must all try their best to interpret the legislation in order to understand the "orders" of the Legislature.

This is not to say that they cannot seek assistance from legal counsel (quite the contrary). However, in the case of certain Forest Service officials (e.g. district managers) exercising statutory decision making authority, it does mean that the responsibility for the final interpretation of the legislation often rests with them.

The principles governing statutory interpretation have been articulated by the courts in a series of rules. These rules are numerous and often complex. However, the following basic principles developed to assist Forest Service staff may also be of use to licensees and their foresters.

Rule # 1:	The Legislature creates the law, and therefore only the Legislature's intentions are relevant. The goal is to determine the Legislature's intentions from the wording of the legislation. Any one else's intentions (including those of any government officials or non-government representatives who may have been involved in drafting the legislation) are irrelevant.
Rule # 2:	Whenever possible apply the plain and ordinary meaning of the words as determined from their context and the general purpose and object (spirit and intent) of the legislation.
Rule # 3:	If applying the plain and ordinary meaning of the words in the legislation would lead to an utterly absurd result (one that could not possibly have been the intent of the Legislature), apply — with caution — any secondary meaning the words are reasonably capable of bearing which will satisfy the purpose and object of the legislation.
Rule # 4:	Government officials should be fair and reasonable, especially when operating within the enforcement context. Generally, any ambiguities in the legislation should be resolved in favor of the person most directly affected by the legislation to the extent possible while still satisfying the purpose and object of the legislation.
Rule # 5:	One section of the legislation is not to be interpreted in such a manner as to leave another section meaningless.

Of these rules, Rule #1 is perhaps the most important. Legislation represents the Legislature's attempt to regulate an activity in a manner consistent with the public interest. The role of government officials, including Forest Service and other government officials, is to **apply the law as the Legislature intended**. The role of licensees and their foresters is to **comply with the law as the Legislature intended**.

At times, they may all feel that the legislation "misses the mark". They may be even tempted to "interpret" the legislation in a manner consistent with their own personal beliefs on how the Legislature should have written the law. However, "interpreting" legislation in this manner takes licensees, their foresters, and Forest Service and other government officials **outside the law**.

One example where a Forest Service official faced this dilemma was the Chief Forester's decision in the "spotted owl case: *Western Canada Wilderness Committee v. The Chief Forester for British Columbia, Larry Pedersen* (Vancouver Registry, CA021741, April 8, 1998). An environmental group challenged the Chief Forester's allowable annual cut (AAC) determinations for the Fraser and Soo Timber Supply Areas, because the Chief Forester did not factor in reductions for the protection of the spotted owl. In his rationales for these AAC determinations, the Chief Forester indicated that he believed measures were required for the protection of spotted owls. However, he also believed that a proper interpretation of his enabling legislation made it inappropriate for him to attempt to implement such measures through reductions to the AAC's. In spite of his own strongly held personal beliefs, the Chief Forester resisted the temptation to "stretch" the wording of the relevant section of the *Forest Act* to expand the scope of his authority to encompass broad land use decisions. His decision was upheld by the B.C. Supreme Court and the B.C. Court of Appeal.

Other Forest Service officials exercising statutory decision-making authority have faced similar dilemmas. This point is illustrated in the case of the district manager whose decision to issue a licence to cut was challenged in *Chetwynd Environmental Society and Canadian Parks and Wilderness Society v. Terry Dyer* (Vancouver Registry No. A953256, October 30, 1995). In this case, the district manager issued the licence to cut for an access road to a proposed oil well site. Though he was personally opposed to the construction of the road, because it would cross fragile alpine habitat, the district manager still issued the licence-to-cut to clear a portion of the road right-of-way. In making his decision, he put aside his own personal beliefs and looked strictly and honestly at his own jurisdiction to issue the licence-to-cut. He concluded that his authority did not extend beyond considering the implications of clearing timber from a portion of the right-of-way which presented no serious environmental or other concerns. It did not extend to considering the merits of constructing the road itself; that decision rested within another ministry. His interpretation of his authority was upheld by the B.C. Supreme Court.

Rule #2 could be paraphrased as an admonition to "**respect the words**". Respect for the plain, ordinary meaning of words is the basis for interpreting any document, and is therefore equally applicable to legislation.

Rule #3 is a "**rule of last resort**". It is only applied when the application of Rule #2 would lead to a patently unreasonable result. Examples of its application in the forest management context are extremely rare, however, it is there to "fall back on" if required.

Rule #4 is also an extremely important rule. One of the fundamental principles underlying any democratic society is the recognition of every person's right to carry on his or her affairs without government interference, unless the law expressly provides otherwise. The courts jealously protect this right by enforcing, as a rule of statutory interpretation, the **presumption that legislation does not intend to constrain a person's freedom of action** unless there is no other reasonable way to interpret the legislation. Furthermore, even when faced with express and unequivocal legislation, the courts will still require any government official who applies the legislation to act in a fair and reasonable manner (see the discussion below on administrative law principles).

Rule #5 is exemplified in the Forest Appeals Commission's decision in the Brooks Bay/Klaskish case (Appeal No. 96/04(b), June 11, 1998). In this case, the appellants argued that section 10(c)(ii) (now section 10(1)(c)(ii)) of the *Forest Practices Code of British Columbia Act* requires a forest development plan to specify measures for every type of forest resource, regardless of whether or not a particular resource has been identified in the content provisions of the Operational Planning Regulation (OPR). This argument, if accepted, would have the effect of making section 10(b)(ii) of the Act and the content requirements of the OPR **virtually meaningless**, since section 10(c)(ii) would incorporate all the resources referred to in those sections and more. The Commission disagreed with the appellants, and decided that the "measures" required under section 10(c)(ii) are limited to those resources identified under section 10(b)(ii) and the OPR.

For a more detailed discussion of these and other principles of statutory interpretation, see the **Risk Management and the Principles of Statutory Decision Making Handbook** (October 1998)[33].

Principles of Administrative Law

All government officials are required to act in accordance with administrative law principles. These principles establish the parameters within which the government must interact with its citizens. Administrative law:

- Sets limits on the actions and decisions of government officials;
- Sets standards of fairness for the conduct of these officials; and
- Provides remedies for those affected by the actions or decisions of these officials.

[33] See note 2 above.

The following is an overview of this important area of law.

> Before making a decision on a matter governed by legislation, a government official must be sure he or she has been given the jurisdiction (legal authority) to do so.

For example, district managers and their staff have multifaceted jobs that include duties and responsibilities that go beyond administering the Forest Practices Code and other forestry legislation. However where their duties and responsibilities are governed by such legislation, they are confined by the jurisdiction given to them under the legislation.

> Unless authorized to do so under the legislation, either explicitly or by necessary implication, a statutory decision maker may not delegate his or her decision making powers to another.

For example, a district manager can delegate specific tasks relating to a statutory decision to his or her staff, such as gathering the information needed to make the decision and even offering recommendations. However, unless the legislation specifically provides for delegation, the district manager generally cannot delegate his or her statutory decision making authority to staff. The final decision must remain with the district manager.

Where delegation of statutory decision making authority is permitted by the legislation, the person to whom the authority is delegated must be allowed the same level of autonomy as the original decision maker would have enjoyed. For example, a district manager cannot control how a statutory decision is made after the authority to make the decision has been delegated, even if the person to whom the authority is delegated is a member of his or her staff.

> Statutory authority must be exercised fairly. Procedural fairness has two elements:
> - the decision maker must be unbiased; and
> - any person directly affected by the decision must be given an opportunity to be heard by the decision maker before the decision is made.

Unbiased Decision Maker

The person directly affected by a statutory decision has the right to be heard by a decision maker who has an open mind, someone who has not already made up his or her

mind and will give due consideration to any information provided by the affected person.

If a decision maker is found to have been biased in making a decision, the courts will usually decide that she or he acted outside her or his jurisdiction. Because the rule against bias lies in the appearance of justice being done, it is not necessary to demonstrate that a decision maker is **actually biased**. The decision maker must avoid even the perception or **apprehension of bias**.

The threshold for finding a perception of bias may be quite low, as demonstrated by in the case of *Metecheah v. the Ministry of Forests and Canadian Forest Products Ltd.* (Vancouver Registry No. A963993, June 24, 1997). In this case, an Indian Band challenged a district manager's decision to issue a cutting permit. The Band alleged that the district manager had demonstrated actual bias. The judge did not agree, and held that there had been **no actual bias** in this case. However, the judge went on to find that there was a perception or **apprehension of bias**. In a letter to the Indian Band, attempting to elicit its input, the district manager had written:

> *"I must inform you that if the application is in order and abides by all Ministry regulations and the Forest Practices Code I have no compelling reasons not to approve their application."*

The judge decided that this statement suggested that the district manager had already concluded that there was no infringement of treaty rights before he had obtained input from the Band, and that his only remaining concerns were with respect to the Forest Practices Code. He held that this "pre-judgment" by the district manager raised a reasonable apprehension of bias, and quashed the approval of the cutting permit on that basis.

Opportunity To Be Heard

The second element of procedural fairness is the right of a person directly affected by a statutory decision to tell his or her side of the story to the decision maker before the decision is made.

In order to exercise this right, the person is entitled to know "the case he or she has to meet", and any factors the statutory decision maker may be using to "structure" her or his thought processes. The person is therefore entitled to prior access to the information that will be presented to the decision maker by Forest Service staff, whether this is the investigation file in the case of an enforcement action, or an evaluation of an operational plan in the case of a plan approval[34]. The person is also entitled to know of any policies that the decision maker may use in considering this information. Finally, the person is entitled to tell his or her side of the story directly to the decision maker. The decision maker cannot delegate this function to his or her staff.

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[34] One exception to this rule concerns privileged material. For example, legal advice is not generally disclosed as such advice is usually protected by solicitor-client privilege. Also, Forest Service staff are not usually required to disclose information from confidential informants.

There is no fixed rule as to what kind of hearing is necessary. The requirement is variable and depends on the circumstances of the case, statutory provisions and the nature of the matter to be decided. However, as a general rule, greater procedural fairness is expected if the decision could have a strongly detrimental impact on a person.

In some very limited circumstances, no opportunity to be heard may be required at all. For example, in a recent appeal to the Forest Appeals Commission, *Canfor v. BC v. FPB* (Appeal No. 97-FOR-30, Mar. 24, 1998), the Commission decided that under section 118(2) of the *Forest Practices Code of British Columbia Act* that the district manager has the discretion to suspend or set aside a person's opportunity to be heard in appropriate circumstances, such as in the case of an emergency.

Statutory authority must be exercised properly. The principles guiding the proper use of decision making authority include:

- Deciding for a proper purpose;
- Considering only relevant information;
- Being reasonable; and
- Avoiding fettering.

Proper Purpose

Statutory powers are not to be used for improper purposes. All decisions must be made in good faith and for the purposes set out in the enabling legislation. For example, it would not be proper for a district manager to refuse to issue a road use permit to one licensee in order to reduce local competition with other licensees.

Relevant Considerations

A statutory decision maker must consider all information that is relevant to his or her decision, and avoid considering any irrelevant information.

In some cases, relevant considerations will be set out in the legislation itself. For example, the Forest Practices Code specifies the content requirements for operational plans[35], and factors to be considered when granting exemptions from the requirements to prepare these plans[36].

When relevant factors are not specified in the legislation, the statutory decision maker must rely on her or his expertise and judgment to determine which considerations are relevant and which are not.

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[35] See sections 10 to 17 of the *Forest Practices Code of British Columbia Act*.
[36] See sections 28 to 33 of the *Forest Practices Code of British Columbia Act*.

For example, in the *Metecheah* case referred to earlier, the Band also argued that the district manager had based his decision on irrelevant considerations, such as the need to make a decision quickly, political pressure, the economic impact of non-approval on the licensee, government policy, and the threat of litigation. The judge held that government policy and the economic impact on the licensee were **relevant** considerations. As for the other factors which the Band argued were irrelevant, the judge was able to determine from the district manager's rationale that while he had considered them, he had not given them **any weight** in making his decision.

Reasonableness

In reviewing a statutory decision, the courts will look into the reasonableness of both the process and the decision itself. Judges may defer to a statutory decision maker's expertise on the merits of the decision if it is reasonable.

The test for what is reasonable is an objective standard. There must be some evidence upon which a reasonable person could reach the same decision.

The legislative framework may assist in determining the limits of reasonableness. For example, section 41(2) of the *Forest Practices Code of British Columbia Act* requires a district manager to be reasonable in requesting additional information for the purpose of deciding whether or not to approve an operational plan. Arguably, unless there were compelling circumstances to warrant such a request, it would not be reasonable for a district manager to request information about **potential** pest hazards under this section when section 13 of the Operational Planning Regulation only requires information on **detected** forest health factors for a forest health assessment.

Fettering

Fettering becomes a concern when policies or guidebooks are followed too closely. Policies and guidebooks are not laws[37]. District managers are entitled to consider guidebooks and other reference materials as part of the decision making process. They are also entitled to consider government policies and to develop their own. However, they must never allow these guidebooks or policies to usurp their decision making authority.

> *"Because the law requires a statutory power to be exercised by the very person upon whom it has been conferred, there must necessarily be some limit on the extent to which the exercise of a discretionary power can be fettered by the adoption of an inflexible policy, by contract, or by other means. After all, the existence of discretion implies the absence of a rule dictating the result in each case; the essence of discretion is that it can be exercised differently in different cases. Each case must be looked at individually, on its own merits. Anything, therefore, which requires a*

[37] There is an exception to this general rule where passages from policies or guidebooks are incorporated by reference into the legislation. However, it is then the words incorporated into the legislation which become law rather than the policy or guidebook from which the words are taken.

> *[statutory decision maker] to exercise his or her discretion in a particular way may illegally limit the ambit (extent) of his or her power. A [decision maker] who thus fetters his or her discretion commits a jurisdictional error which is capable of judicial review." (Administrative Law, Jones & De Villars).*

The Forest Appeals Commission considered fettering by the use of policy in *Canadian Forest Products Ltd. v. Gov't of British Columbia, Appeal No. 97-FOR-06, October 10, 1997.* In that case the licensee had been found in contravention of section 67 of the *Forest Practice Code of British Columbia Act* by the district manager and the review panel. The licensee argued that the district manager's decision to find the licensee liable rather than its contractor was the result of the district manager fettering himself through blind adoption of Ministry of Forests' Policy 16.10, which advised district managers to normally hold licensees responsible for a contravention, and implied that the contractor could only be held liable if his non-compliance was 'willful or reckless'. The Commission held that the district manager had considered himself bound by the policy, and that he had fettered himself in his decision not to proceed against the contractor.

There are exceptions to the rule against fettering, namely where the enabling legislation requires it. For example, section 105 of the *Forest Act* requires that stumpage rates be calculated "in accordance with the policies and procedures approved for the forest region by the minister." In creating binding policies, the legislation overrides the rule against fettering.

> The general rule is that a statutory decision maker may not revisit or amend his or her decisions, unless the legislation provides otherwise.

While a district manager or other government official who makes a statutory decision cannot normally revisit or amend his or her decision, a licensee who is directly affected by the decision is usually entitled to challenge it by either:

- appealing the decision; or
- applying for a judicial review of the decision.

In addition, third parties may also be able to challenge these decisions in certain circumstances.

Statutory decisions can only be appealed if the legislation specifically provides a right of appeal. There is no such thing as an "unwritten right to appeal".

The *Forest Practices Code of British Columbia Act*, the *Forest Act* and the *Range Act* each provide for administrative reviews of some decisions, and a further right of appeal of these decisions. These reviews and appeals provide another look at both the

procedural fairness and the substantive merits of the decisions. In most cases, the right of appeal is limited to the person who is the subject of the decision. However, under the Forest Practices Code, the Forest Practices Board may also appeal certain types of decisions.

The only right of appeal which is relevant to the operational planning context is the right of the Forest Practices Board to request a review and subsequently an appeal of decisions relating to the approval of forest development plans and range use plans. Neither the licensees nor anyone else can appeal a district manager's decision to approve – or not approve – an operational plan.

However, even without a statutory right of appeal, a licensee may challenge decisions relating to the approval or non-approval of their operational plans by means of judicial review. The courts have the inherent authority to review all statutory decisions, and this authority has been codified in B.C. in the *Judicial Review Procedures Act*.

In certain circumstances, third parties can also challenge decisions relating to the approval of a licensee's operational plan by applying for a judicial review of such decisions. It is therefore definitely in a licensee's best interest to do everything possible to ensure the approval will withstand challenge by applying risk assessment and risk management principles effectively in preparing the plan.

For a more detailed discussion of these and other principles of administrative law, see the **Risk Management and the Principles of Statutory Decision Making Handbook** (October 1998)[38].

[38] See note 2 above.

Summary

Part I

- Risk is the potential for loss or damage resulting from a particular action or decision.
- Risk assessment is the process of determining the likelihood and magnitude of loss or damage.
- Risk management is the "art" of weighing the assessed risks against the expected benefits to make the "best" forest management decision.
- The goal is to achieve an optimal or at least acceptable levels of risks and to avoid unacceptable levels of risk.
- The three key forest management risks are: environmental, social and economic.
- Uncertainty cannot be avoided; it must be managed.
- "Real risks" and "perceived risks" are not discrete categories. They represent instead a continuum of risks that must be managed.

Part II

- Our system of government is based on the separation of powers among the three branches of government: the Legislature, the Judiciary and the Executive. The Forest Practices Code transfers control of forest management from the Executive to the Legislature.
- There are two main approaches to risk management:
    1. "process based"; and
    2. "results based".
- Recent amendments to the Forest Practices Code have moved its underlying approach to risk management closer to a results based approach.

Part III

- With the enactment of the Forest Practices Code, the Legislature has delegated decision making authority on a broad range of forest management matters to key government officials. However, in doing so, it has at the same time curtailed the discretionary powers of these officials.

- When acting in their capacity as statutory decision makers, district managers and other government officials, in essence, report directly to the Legislature.
- Licensees and their foresters control key forest management decisions under the Forest Practices Code.
- Neither the licensee nor the licensee's forester should rely on Forest Service staff to identify or solve shortcomings in an operational plan.
- Licensees and their foresters must be sufficiently knowledgeable about the legislative framework to understand their rights and their obligations, and to properly apply risk assessment and risk management principles within the limits set by that framework.

Part IV

- Under the Forest Practices Code, risk is managed at four distinct stages:
    1. During the development of the legislative framework;
    2. When operational plans are prepared and approved;
    3. During compliance activities, including licensees' internal "quality assurance" inspections as well as inspections carried out by Forest Service and other government officials; and
    4. When enforcement actions are taken by Forest Service or other government officials.
- At each of these stages, licensees, their foresters, and Forest Service and other government officials must understand:
    - those risk management decisions which have already been made in developing the legislative framework;
    - the level of discretion conferred on licensees and their foresters, or on Forest Service and other government officials, to make risk management decisions;
    - the criteria which must be met in exercising any discretion conferred under the legislation;
    - those decisions which rest with licensees and their foresters; and
    - those decisions which rest with Forest Service and other government officials.

Part V

- In order to effectively manage risk within a statutory framework, licensees and their foresters should become familiar with the legal principles that govern this framework, the most important of which are the principles of statutory interpretation and administrative law.
- The principles of statutory interpretation are the rules laid down by the courts for interpreting the "orders" of the Legislature.
- The principles of administrative law:
    - Sets limits on the actions and decisions of government officials;
    - Sets standards of fairness for the conduct of these officials; and
    - Provides remedies for those affected by the actions or decisions of these officials.

Q's and A's

Q. Should a licensee be utilizing risk assessment and risk management principles?

A. Yes. Risk assessment and risk management principles come into play both in the preparation of operational plans and during the course of the licensee's own internal "quality assurance" inspections. The key is to ensure the application of these principles is consistent with the legislative framework. In some cases, important risk management decisions have already been made during the development of the legislation. In other cases, the legislation allows licensees broad discretion to apply these principles.

Q. What is the difference between "real risk" and "perceived risk"?

A. "Real risk" is a risk identified through an assessment process that is based on expert analysis grounded in scientific principles. "Perceived risk" is a risk identified through a risk assessment process based on an individual's or society's impressions, instincts, experience or intuition rather than empirical analysis. The two categories represent a continuum. The "real risk" end of the continuum represents the greatest degree of precision and certainty in identifying a risk.

Q. Can a "perceived risk" influence a district manager's or designated environment official's decision to approve or not approve an operational plan?

A. Yes. Although "real risk" information may be easier to understand and evaluate, this does not mean that an analysis based solely on "real risk" information would capture all the relevant issues. "Perceived risk" information should be also considered as it may add another perspective on the values to be managed, and help identify risks to these values overlooked during the assessment of "real risks." The further the information lies along the "perceived risk" continuum, the more difficult it is to address. However, if "perceived risk" information is based on judgment and experience, it can still be very compelling and should be given very careful consideration.

Q. How should a licensee or a licensee's forester deal with uncertainty?

A. Uncertainty in the forest management context can never be eliminated; it can only be managed. Investment in research and the collection and analysis of more information is essential to manage uncertainty in the long-term. However, it is important to acknowledge the costs associated with this approach and to recognize that it may not be effective in the short term. When a decision cannot be delayed, other methods for managing uncertainties must be employed. In the operational planning context, using sensitivity analyses and judgment can be very effective.

Q. What options does a licensee have if a district manager or a designated environment official refuses to approve an operational plan?

A. The first step is to understand the rationale for the decision not to approve the plan. If the licensee can identify no legal error in the rationale, the best course may be to address the issues raised by the decision maker and resubmit the plan. However, if the licensee believes there is a legal error, the licensee can apply to the courts to have the decision judicially reviewed.

Q. Can a Minister, Deputy Minister, or another member of the ministry executive determine the outcome of a statutory decision being made by a district manager or designated environment official?

A. No. When they are making statutory decisions, the district manager and designated environment official are accountable to the Legislature and receive their "order" from the legislation itself. They are required by law to maintain their independence. If they allow themselves to be "fettered" by direction from their ministry executive, the courts have the power to strike down their decisions.

Q. Can additional "mandatory" content requirements, over and above the content requirements specified in the legislation for an operational plan, be imposed on licensees or their foresters through policies or directions from Forest Service or other government officials?

A. No. Mandatory content requirements are restricted to the requirements set out in the legislation. However, information regarding values or risks that are not mandatory content requirements may still be relevant. Licensees and their foresters must consider any information provided by referral agencies or by the public through the review and comment process, and determine how it should be addressed. Also, in deciding whether to approve the plan, a district manager also has the power to ask for additional information he or she may reasonably require in order to make a decision. However, this does not mean this information will necessarily have to be included in the operational plan, just as the assessment information a licensee collects for the purpose of preparing the plan is not necessarily included in the plan.

Q. **Is a district manager or designated environment official entitled to use policies to assist him or her in making a statutory decision?**

A. Yes. A district manager or designated environment official may use policies to articulate "guiding principles" to assist them in structuring their thought processes. However, if they wish to use policies for this purpose, they must make them public. Also, they must never allow these policies to dictate or "fetter" their decisions. They must retain their independence, and consider each case on its own merits having regard to the unique circumstances of the case.

Q. **Can a district manager or designated environment official direct a licensee to incorporate or follow guidebooks in preparing or implementing an operational plan?**

A. No, for the same reasons given in response to the proceeding question. However, it is important to keep in mind that in some cases a guidebook or a portion of a guidebook is actually incorporated into the legislation by reference. If so, the words from the guidebook that have been incorporated into the legislation become part of the legislation. Also, a district manager or designated environment official may still use guidebooks as reference material, and may consider their contents in determining what is the "best practice" for dealing with a forest management issue.

Q. **Is a licensee always entitled to an opportunity to be heard?**

A. Generally, yes except in very limited circumstances, such as in the case of an emergency. The right to be heard applies to decisions relating to operational plans, as well as decisions relating to administrative remedies.

Q. **Can risk assessment or risk management principles be used to justify operating outside the strict requirements of the legislation?**

A. No. These principles can never be used to justify "breaking the law". They must be applied within the limits set by the legislation.

Q. **Shouldn't the fact that a registered professional forester has signed and sealed an operational plan that is submitted for a district manager's or designated environment official's approval be enough to satisfy the district manager or designated environment official that the requirements of section 41 of the Forest Practices Code of British Columbia Act have been met?**

A. No. If the fact that the plan has been signed and sealed by a registered professional forester was sufficient in the eyes of the Legislature, the legislation would not have required approval by a district manager or designated environment official. As the stewards of lands "held in trust" for the public, these government officials must view matters from a slightly different perspective than a licensee's forester. For this reason, while they may give considerable weight to the judgment and professionalism of this forester, they must still consider the plan in the context of broader public interest considerations.

Q. **How are risk assessment and risk management principles related to the concept of "due diligence"?**

A. One of the factors to be considered in assessing "due diligence" is whether a licensee is able to demonstrate that all reasonably foreseeable risks were appropriately addressed. Effective application of risk assessment and risk management principles may make it much easier for a licensee to demonstrate that this was done.

Q. **Is it acceptable to seek advice from Forest Service staff or other government officials when preparing an operational plan?**

A. Yes. Forest Service staff can give advice. However, they cannot give direction; nor can they tell the licensee whether or not the plan will be approved. The plan is the licensee's and it is up to the licensee and the licensee's forester to decide what will or will not be in the plan. When it comes to the approval of the plan, the decision to approve or not approve rests solely with the district manager or designated environment official. No one can pre-judge their decision or make this decision for them.

Q. **Should licensees carry out their own "quality assurance" inspections?**

A. Yes. In order to reduce the risk of contraventions of forest practice standards set by the legislation, the risk that the operational plan may not be followed or may even be wrong, and the risk of an unforeseen, undesirable result occurring during implementation, licensees should conduct their own inspections. Relying on inspections carried by Forest Service staff or other government officials is insufficient for the purpose of demonstrating due diligence.

Q. **Who is accountable for contraventions of the Forest Practices Code if an operational plan has been prepared that incorporates recommendations from an assessment and subsequently, during the implementation of the plan, the licensee's operations cause environmental damage that is not permitted under the Code?**

A. Generally, the licensee bears primary responsibility if there is a contravention, keeping in mind that not every case of environmental damage is a contravention. However, even if enforcement action is taken, it does not necessarily mean that the licensee has been a poor performer or is "at fault". If an administrative penalty is levied, it may be solely for the purpose of compensating the government (and hence the public). In this case, if the licensee's reliance on the assessment was reasonable (i.e. if it was prepared by a qualified professional), and if there was no lack of diligence in implementing the plan, there may well be no finding of "fault". On the other hand, if the licensee is unable to demonstrate that due diligence was exercised, and there is a finding of "fault", the administrative penalty may also include a deterrent component. It is also possible that the professional who carried out the assessment or the professional who prepared the plan (which could be one and the same person) may be held accountable by his or her professional association for lack of care in either

carrying out the assessment or preparing the plan. On the other hand, the professional may have done everything he or she should have done in the circumstances, and will not be held accountable for the results. It may be that the risk that resulted in the environmental damage was not reasonably foreseeable.

For more information about risk management, visit the
Compliance and Enforcement Branch Risk Management Website at
http://www.for.gov.bc.ca/enforce/index.htm